IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel SCOTT EDWARDS,

Petitioner/Appellee

vs.) No. 34159

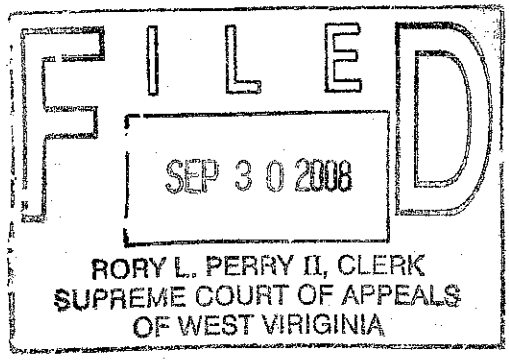
LINDA L. GIBSON, Recorder for the City of Hurricane, Putnam County, West Virginia; DONALD E. CHANEY; WILLIAM R. BILLUPS; C. BRIAN ELLIS; PATRICIA D. HAGER; and LANA M. CALL, Members of the City Council Of the City of Hurricane, Putnam County, West Virginia,

Defendants/Appellees,

v.

SAM E. COLE,

Intervenor/Appellant.



RESPONSE BRIEF OF THE PETITIONER/APPELLEE, SCOTT EDWARDS

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I. Type of Proceeding and Nature of the Ruling of the Circuit Court of Putnam County, West Virginia

On June 12, 2007, Scott Edwards was elected mayor of the City of Hurricane, Putnam County, West Virginia. A subsequent canvas and recount by the Hurricane City Council confirmed the election results. Edwards was certified as winner of the mayor's race on June 26, 2007. Eighty-five days later, on September 19, 2007, Mayor Edwards' election opponent, Sam E. Cole, mailed a "petition to contest election" to the Hurricane City Recorder and asked the Hurricane city council to schedule a hearing on his petition.

The Hurricane City Council had no jurisdiction to conduct an election contest because the petition by Mayor Edwards' opponent was not timely submitted and was never served on Mayor Edwards.

Mayor Edwards filed this action seeking the extraordinary remedy of prohibition to stop the City Council from hearing the election contest. Mayor Edwards' grounds for this petition were that the Council had no jurisdiction to proceed. When this case came on for hearing in the circuit court, Mayor Edwards' opponent was permitted to intervene and participate in arguments. Mayor Edwards demonstrated to the Circuit Court of Putnam County that there was a clear limitation on the Hurricane governing body's jurisdiction, and that there were no disputed issues of fact. The jurisdictional question could be decided purely as a matter of law. At an October 26, 2007, hearing, the Circuit Court of Putnam County, the Honorable N Edward Eagloski, Jr. presiding, determined as a matter of law that the Hurricane City Council patently and unquestionably lacked jurisdiction to conduct a contest of that city's June 12, 2007, municipal election. The writ of prohibition prayed for by Scott Edwards was granted. The intervenor, Sam Cole, has appealed that decision.

II. Points and Authorities Relied Upon

W. Va. Code §3-7-6

W. Va. Code §56-2-1

Pugh v. Policemen's Civil Service Comm., 214 W. Va. 498, 590 S.E.2d 691 (2003)

State v. Burnside, 212 W. Va. 74, 569 S.E.2d 150 (2002)

Health Management, Inc., v. Lindell, 207 W. Va. 68, 528 S.E.2d 762 (1999)

Blake v. Charleston Area Medical Center, 201 W. Va. 469, 498 S.E.2d 41 (1997)

Martin v. West Virginia Division of Labor Contractor Licensing Board, 199 W. Va. 613, 486 S.E.2d 782 (1997)

State ex rel. Heckler v. Christian Action Network, 201 W. Va. 71, 491 S.E.2d 616 (1997)

Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996)

Holland v. Joyce, 155 W. Va. 535, 185 S.E.2d 505 (1971)

State of W. Va. ex rel. Staley v. Wayne County Court, 137 W. Va. 431, 73 S.E.2d 827 (1953)

Evans v. Charles, 133 W. Va. 463, 56 S.E.2d 880 (1949)

Irons v. Fry, 129 W. Va. 284, 40 S.E.2d 340 (1946)

Morrison v. McWhorter, 57 W. Va. 614, 52 S.E. 394 (1905)

III. Statement of the Facts of the Case

On June 12, 2007, the city of Hurricane, Putnam County, West Virginia, held a municipal election to fill the offices of mayor, city recorder and all of city council. On election day an issue arose regarding the use of privacy envelopes for early voting ballots, despite the fact that those ballots had been handled in keeping with instructions from the County Clerk of Putnam County and the West Virginia Secretary of State's office. The questioned ballots were counted and Scott Edwards was declared winner of the mayor's race. On June 18, 2007, the city council of Hurricane conducted a canvas of the election. That canvas confirmed all of the results announced on Election Day.

Sam Cole, Mr. Edwards' opponent in the mayor's race, requested a recount of the votes. That recount was held by the Hurricane city council on June 26, 2007. Every vote was inspected. The council determined that all of the voting records were in perfect order. Poll workers properly signed all ballots. All of the votes cast in the election were counted and Scott Edwards was certified as the winner of the race for the office of mayor.

On July 6, 2007, Sam Cole addressed a letter to "City of Hurricane Council" and "Putnam County Commission." The letter began with this greeting: "Dear Council & Commissioners:" A copy of this letter can be found in the record as **Exhibit 1** attached to

the original petition for appeal. The letter states that it is written for the purpose of providing "you" (presumably meaning the members of the Hurricane city council and the Putnam County Commission) with notice of Sam Cole's intention "to contest the legality of the City of Hurricane election held on June 12, 2007." The letter does not name Scott Edwards. It does not say what office, if any, Sam Cole was a candidate for in the June 12 election. The letter does not say what elected office is contested. On its face the letter is a general challenge to the use of all early voting ballots in every contest that was a part of the Hurricane municipal election. This letter was mailed by regular United States mail.

On the same day he sent his letter to "City of Hurricane Council" and "Putnam County Commission," Sam Cole filed a civil action in the Circuit Court of Putnam County naming as defendants "City of Hurricane, Putnam County Commission." In his civil complaint, Mr. Cole asks the circuit court to "omit the early ballots from consideration of the aforesaid election; declare the Plaintiff to be the successful candidate for Mayor of the City of Hurricane; and grant the Plaintiff such other further and general relief as the Court deems appropriate under the circumstances." Scott Edwards was not named as a party to the civil action. Mr. Edwards was not served with a copy of the complaint. No copy of the complaint was ever hand-delivered or mailed to Scott Edwards. Mr. Cole's civil complaint and civil action coversheet is a part of the record as pages 1 thru 6 in the record of civil action 07-C-226.

The substantive issue raised in Mr. Cole's civil complaint relates to whether early voting ballots cast in the Hurricane municipal election, even though proper in every regard, should have been discarded by the city council during its canvas and recount. Cole alleges that the absence of privacy envelopes on these ballots forms a substantive basis for disenfranchising early voters. This substantive issue was never addressed in that case. The Putnam County Commission was voluntarily dismissed from the case. Hurricane responded with a motion to dismiss pursuant to Rule 12 (b) of the West Virginia Rules of Civil Procedure, correctly noting that original and exclusive jurisdiction to hear and decide a municipal election contest lies with the governing body of the municipality.

A hearing on the city's motion to dismiss was held by Judge O. C. Spaulding. A transcript of that hearing is part of the record as pages 50 thru 53 of the record of civil action 07-C-226. Mr. Cole represented to the court that he had "contested" the election by asking for a recount. ***(Transcript of Sept. 19, 2007, at page 7.)*** The city attorney for Hurricane correctly pointed out to the court that asking for a recount is not the same thing as contesting the results of an election. ***(Transcript of Sept. 19, 2007, at page 8.)*** After listening to the lawyers debate whether an election contest had or had not been conducted, the court realized that there had never been a contest at the municipal level. ***(Transcript of Sept. 19, 2007, at page 15.)*** Judge Spaulding addressed the lawyers in the following exchange:

> "THE COURT: Okay, Mr. Moye, any problems that I remand this case back to the city of Hurricane, that they then conduct a contest of the election, that they, the new council does that, they hear the evidence and make findings, and if its adverse to Mr. Cole then we'll look at judicial review? I can find you judicial review. You haven't looked at the right place yet. Can we go ahead and do that?"
>
> MR. MOYE: Your honor, all I wanted, if the court is going to remand that, that will preserve our challenge and preserve our -- and we are not time-barred or anything, that would be fine with us. I mean, we'll go back."
>
> MR. FLORA: Your Honor, we are asking for a dismissal and for Mr. Cole to pursue his remedies, you know, but I think the net effect is the same either way. Assuming that all other procedural matters have been dealt with according to statute, we would have no problem with the remand."
>
> THE COURT: Then I so order. ... ." ***(Transcript of Sept. 19, 2007, at page 16.)***

Shortly after this hearing concluded, Judge Spaulding entered an order saying "this matter is hereby remanded to the City of Hurricane for hearing. Upon a ruling from the City Council of the City of Hurricane an appeal may be filed with this court. Accordingly, this matter is dismissed and stricken from the court's docket." Never, from the date of its filing until the date of its dismissal was any pleading relative to this civil action served on or directed to Scott Edwards. Scott Edwards did not make any

appearance in a civil action. There was no effort by Sam Cole to make Mr. Edwards a party.

On September 19, 2007, five days before Judge Spaulding dismissed Mr. Cole's circuit court case, Mr. Cole mailed to the Hurricane city recorder a document captioned "Petition to Contest Election." This document was accompanied by a cover letter asking the city to hold a special session of its council during the week of September 24, 2007, for the purpose of hearing Mr. Cole's September 19, 2007, petition. No copy of this letter or "petition" was either mailed to, handed to or served upon Scott Edwards by Mr. Cole or anyone acting on his behalf.

When Mayor Edwards learned of Cole's "Petition to Contest Election", he retained counsel and filed a verified petition for writ of prohibition in the Circuit Court of Putnam County. The allegations in Edwards' petition are simple and straightforward. The ability of one to prosecute an election contest is governed by specific jurisdictional time limitations. Mr. Cole did not meet those time limitations. Because Mr. Cole did not meet the jurisdictional requirements, the city council of Hurricane had no jurisdiction to hear his "Petition to Contest Election."

Mr. Edwards' petition was filed on September 26, 2007. In accordance with the standard procedure of the Putnam County circuit clerk's office the case was assigned a civil action number and, through a computer program approved by this Court known as "Circuit Select," a random assignment of the case was made to Judge Eagloski. Judge Eagloski issued a rule to show cause and set the matter for hearing on October 26, 2007.

At Judge Eagloski's hearing on the writ of prohibition, Sam Cole was permitted to intervene and present his substantive arguments to the court on the issue of whether the Hurricane city council had any jurisdiction to hear Cole's election contest. On this issue Mr. Cole put forth two arguments. First, he said, mailing a letter to the "City of Hurricane Council" and bringing a lawsuit in the circuit court against "City of Hurricane" satisfied the statutory notice requirements set forth in the West Virginia Code relative to election

contests. Second, said Cole, Edwards had a duty to intervene in Cole's lawsuit and make his arguments about jurisdiction there.

Judge Eagloski correctly ruled as a matter of law that Mr. Cole had not satisfied the jurisdictional requirements for the commencement of an election contest. The judge found that the governing body of the city of Hurricane patently and unquestionably lacked jurisdiction to hear the "Petition to Contest Election." Mr. Cole had waited until 85 days after certification of the election to submit his petition. He had never served Mr. Edwards with any notice of his desire to contest the election. Mr. Cole had simply filed the wrong case, in the wrong court and at the wrong time. Doing those things wrong, ruled Judge Eagloski, did not give Mr. Cole the ability to proceed further.

Mr. Cole briefly discussed the issue of *res judicata* at this hearing. Because it was obvious none of the elements of *res judicata* were present, Judge Eagloski proceeded to decide the substantive issues of the case.

IV. Argument

Mr. Cole's assigned error appears to combine two assignments in a single sentence. He says that the circuit court erred in failing to consolidate his original circuit court action against the City of Hurricane with Mr. Edwards' action for writ of prohibition. He also says that the circuit court erred in dismissing "the second civil action" by finding that the appellant, Mr. Cole, failed to adhere to the notice provisions of *W. Va. Code* §3-7-6. For purposes of this argument the appellee will deal with these statements in reverse order. In the body of his brief, Cole raises an issue of *res judicata.* That argument will be dealt with last.

A. Prohibition

The appellant is asking this court to review the circuit court's order granting relief through the extraordinary writ of prohibition. The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of prohibition is *de*

novo. Pugh v. Policemen's Civil Service Comm., 214 W. Va. 498, 590 S.E.2d 691 (2003); *Health Management, Inc., v. Lindell*, 207 W. Va. 68, 528 S.E.2d 762 (1999); and *Martin v. West Virginia Division of Labor Contractor Licensing Board*, 199 W. Va. 613, 486 S.E.2d 782 (1997). In hearing and deciding an election contest, the governing body of the city of Hurricane performs a quasi-judicial function. For a writ of prohibition to issue preventing such a quasi judicial tribunal from taking up a particular matter on the basis of lack of jurisdiction, it must be demonstrated there is a clear limitation on the tribunal's jurisdiction, and that there are no disputed issues of fact such that the jurisdictional question may be decided as a matter of law. The prohibition remedy is available only where an administrative tribunal patently and unquestionably lacks jurisdiction over the matter pending before it. *Health Management, Inc., v. Lindell*, 207 W. Va. 68, 528 S.E.2d 762 (1999).

The question whether Mr. Cole successfully initiated an election contest can be answered, as it was by Judge Eagloski, by reading *W. Va. Code* §3-7-6 that provides in pertinent part as follows:

> **§3-7-6. County and district contests; notices; time.**
>
> **In all cases of contested elections**, the county commission shall be the judge of the election, qualifications and returns of their own members and of all county and district officers: *Provided*, That a member of the county commission whose election is being contested may not participate in judging the election, qualifications and returns.
>
> **A person intending to contest the election of another** to any county or district office, including judge of any court or any office that shall hereafter be created to be filled by the voters of the county or of any magisterial or other district therein, **shall, within ten days after the result of the election is certified, give the contestee notice in writing of such intention and a list of the votes he will dispute, with the objections to each, and of the votes rejected for which he will contend. If the contestant objects to the legality of the election or the qualification of the person returned as elected, the notice shall set forth the facts on which such objection is founded.** The person whose election is so contested shall, within ten days after receiving such notice, deliver to the contestant a like list of the votes he will dispute, with the objections to

each, and of the rejected votes for which he will contend; and, if he has any objection to the qualification of the contestant, he shall specify in writing the facts on which the objection is founded. **Each party shall append to his notice an affidavit that he verily believes the matters and things set forth to be true.** If new facts be discovered by either party after he has given notice as aforesaid, he may, within ten days after such discovery, give an additional notice to his adversary, with the specifications and affidavit prescribed in this section.

The provisions of this section apply to all elections, including municipal elections, except that the governing body of the municipality is the judge of any contest of a municipal election. (emphasis supplied)

The code unambiguously requires that the contestant [in this case Mr. Cole] shall give the contestee [Mr. Edwards] notice in writing of his intention to contest the election within 10 days after the results of the election are certified. This notice requirement is mandatory and must be strictly complied with. This Court has said in positive terms that unless such notice is given within the time provided by statute, the body charged to hear such a contest is utterly without jurisdiction to entertain, hear or determine the issue. *State of W. Va. ex rel. Staley v. Wayne County Court*, 137 W. Va. 431, 73 S.E.2d 827 (1953). Mr. Cole admitted in the hearing before Judge Eagloski that no notice in writing of his intention to contest the Hurricane mayor's race was served upon Scott Edwards at any time. The best that Mr. Cole could say is that sending a letter by regular mail to the "City of Hurricane Council" satisfied his duty to give notice. As a matter of law, this is incorrect. A notice of election contest is in the nature of a pleading. *Morrison v. McWhorter*, 57 W. Va. 614, 52 S.E. 394 (1905). The purpose of the notice is not only to notify the contestee, but also to fully and completely inform him of the character and cause of the ground of contest. A notice of contest that does not at least state that the contestant was a candidate for the contest and office and legally entitled thereto is defective and void. *Irons v. Fry*, 129 W. Va. 284, 40 S.E.2d 340 (1946).

The July 6, 2007, letter Mr. Cole wants to rely on as notice of an election contest does not identify him as a candidate, does not state that he is legally entitled to the office of mayor, does not state that it is the mayor's election he wishes to contest, does not

specifically list the votes that he wishes to contest, and does not name Scott Edwards as a contestee. Even if this document had been served upon Mr. Edwards, as a notice of contest it is a nullity on its face and entitled to no consideration.

Mr. Cole also asserts that he met the notice requirements of *W. Va. Code* §3-7-6 by filing a lawsuit in the Circuit Court of Putnam County and by naming the City of Hurricane as a defendant, without first having initiated an election contest before the governing body of that city. This is just plain wrong. The original and exclusive jurisdiction to decide a contest of the election involving the selection of a municipal officer is vested in the common council of the municipality. *Evans v. Charles*, 133 W.Va. 463, 56 S.E.2d 880 (1949).

The *Evans* case is a lot like this case. A municipal election was held in the town of Anawalt, a municipality in McDowell County. After the election it was determined that 666 votes had been cast although there were no more than 500 persons legally qualified to vote in the town. All of the candidates for the party that lost in the election filed a civil action in the Circuit Court of McDowell County challenging the legality of the election process. Mr. Charles, one of the town election commissioners filed a motion to dismiss the lawsuit on the grounds that there existed no statutory or equitable authority conferring jurisdiction on the circuit court to hear a municipal election contest. The Court held that elections are creatures of statute and that the statute conferring it jurisdiction on the governing body of a municipality to hear and decide contested elections was original and exclusive in nature. The statute dealt with in the *Evans* case was the predecessor of *W. Va. Code §3-7-6.* The circuit court's dismissal of the case was upheld. A circuit court has no jurisdiction either legal or equitable to hear and determine the legality of an admissible election in the first instance. "The law does not confer upon a circuit court original jurisdiction of an election contest but only appellate jurisdiction which may be invoked in the manner provided by law. *Moore v. Holt, 55 W. Va. 507, 47 S. E. 251; State ex rel Thompson v. McAllister, 38 W. Va. 485 18 S.E. 770, 24 LRA 343. See Martin v. White, 74 W. Va. 628, 82 S.E. 505." Evans*, supra at 474.

Mr. Cole has put forth an argument that his letter or his lawsuit should at least be considered "constructive" notice to Mr. Edwards of the election contest. That is not what *W. Va. Code* §3-7-6 says. The Code says that the contestee shall be given notice in writing. No specific manner for the giving of this notice is set forth so the terms of *W. Va. Code* §56-2-1 must apply. This section provides that where no particular mode of serving a notice is prescribed, notice may be served by delivering a copy thereof in writing to the party in person or by delivering such copy to his usual place of abode or, if no one over the age of 16 years be at the place of abode, by leaving a copy of the document posted at the front door of the abode. That is the way notice of an election contest should be and must be given. The idea that mailing a letter to a third party or filing a lawsuit against a third party in the wrong jurisdiction can be sufficient notice just because an interested party may become aware of such mailing or filing is absurd. Cole's lawsuit did not name Scott Edwards as a party. Scott Edwards was never a party nor did he ever make an appearance in this lawsuit. Scott Edwards was never served with a copy of the lawsuit. Even if pleadings had been served on Mr. Edwards, nothing could have been accomplished because the circuit court had no jurisdiction to entertain any substantive issue relative to the Hurricane municipal election.

B. Consolidation

The appellant complains about the circuit court's denial of his motion to consolidate his original circuit court lawsuit with this action. With regard to the lower court's decision not to consolidate this action with Mr. Cole's prior lawsuit, an abuse of discretion standard of review should be utilized. *State v. Burnside*, 212 W. Va. 74, 569 S.E.2d 150 (2002). This Court explained in syllabus point 1 of *Holland v. Joyce*, 155 W. Va. 535, 185 S.E.2d 505 (1971) that pursuant to the West Virginia Rules of Civil Procedure, Rule 42, a trial court has broad discretionary power to consolidate civil actions. The action of a trial court in consolidating or refusing to consolidate civil actions will not be reversed in the absence of a clear showing of abuse of such discretion, and in

the absence of a clear showing of prejudice to any one or more of the parties to the civil actions seeking consolidation.

In this case, the circuit court permitted the appellant to intervene and present all of his substantive arguments regarding the issue of the timeliness of appellant's attempt at an election contest. Having had the opportunity to fully present his arguments, the appellant cannot say that he suffered any prejudice from the circuit court's denial of his motion to consolidate. Indeed, there was nothing to consolidate. Mr. Cole's original suit in the circuit court had been dismissed and stricken from the active docket of the court two days before the instant case was filed and 32 days before Mr. Cole argued his motion to consolidate. The other circuit judge in the 29th Judicial Circuit—Judge O. C. Spaulding—entered the dismissal order in Mr. Cole's case. It would have been inappropriate for Judge Eagloski to enter an order reversing Judge Spaulding's dismissal for the purpose of consolidation. The appellant makes no representation that he made any attempt to reinstate his original lawsuit so that some action would have existed that could have been consolidated. Judge Eagloski did not abuse his discretion in refusing to consolidate a lawsuit that had already been dismissed with this action. By granting Mr. Cole's motion to intervene, the circuit court gave Mr. Cole every opportunity to participate in the decision of the substantive issues in this case. There is no error in the manner in which the circuit court dealt with the consolidation issue.

C. Res Judicata

Sam Cole argues that the doctrine of *res judicata* should have prohibited the circuit court from considering Mr. Edwards' petition for writ of prohibition. With regard to the circuit court's final order and the issue of *res judicata*, this Court should employ a multifaceted standard of review. Judge Eagloski's final order and his ultimate disposition of this case should be reviewed under an abuse of discretion standard. Findings of fact are viewed under a clearly erroneous standard and conclusions of law are reviewed *de novo*. *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996); *State ex rel. Heckler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 616 (1997). The facts

relating to *res judicata* are undisputed. This Court is left with *de novo* review of the legal issues relative to that doctrine.

For the appellant to prevail in the circuit court on the basis of *res judicata*, it was incumbent upon him to satisfy the three elements of that doctrine. First, there must have been **a final adjudication on the merits** in the prior action **by a court having jurisdiction** of the proceedings. Second, the two actions must **involve the same parties** or persons in privity with those parties. Third, the cause of action identified for resolution and the subsequent proceedings either must be **identical to the cause of action** determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. *Blake v. Charleston Area Medical Center*, 201 W. Va. 469, 498 S.E.2d 41 (1997). (emphasis supplied)

On the motion of the appellee the complete record from Mr. Cole's original Putnam County lawsuit has been made a part of the record in this case. A comparison of the record in that case with the record in this case shows without doubt that none of the three elements of the doctrine of *res judicata* exist.

Mr. Cole's original lawsuit did not result in a final adjudication, on the merits or otherwise, of any substantive issue relating to the timeliness of his attempted election contest nor to the question of jurisdiction to proceed with such a contest by the Hurricane governing body. The City of Hurricane made a Rule 12(b) motion to dismiss Mr. Cole's original lawsuit. Mr. Cole's lawyer and the city's lawyer appeared before Judge Spaulding and argued about whether Judge Spaulding's court was the proper place to litigate Cole's claims. An inspection of the transcript of the hearing on the city's motion to dismiss shows that Judge Spaulding simply adopted the agreement of the lawyers that the Hurricane city council would be the proper place to hold an election contest. Judge Spaulding then solicited an agreement by the lawyers to "remand" the case to the city and dismissed Mr. Cole's case from the docket. There was never a discussion relative to jurisdiction of the governing body, nor whether Mr. Cole had satisfied his statutory jurisdictional requirements. Judge Spaulding was simply confronted with a case that had

been brought in the wrong court. When that fact became apparent he gave the lawyers an opportunity to go back to the proper tribunal and dismissed the case. There was never a final adjudication by Judge Spaulding regarding the ongoing jurisdiction of the Hurricane governing body to hear Mr. Cole's election contest.

Even if Judge Spaulding had attempted adjudication on the merits, the first element of *res judicata* would not exist. Exclusive jurisdiction to hear and decide a municipal election contest resides in the governing body of the municipality. As Judge Spaulding realized, his court had no jurisdiction to deal with the substantive issues in Mr. Cole's lawsuit. The case had simply been brought in the wrong court.

Mr. Cole's original lawsuit and this case do not involve either the same parties or parties in privity with those parties. Mr. Cole brought a suit against the City of Hurricane. He did not bring an action against Scott Edwards. He never made an attempt, either before or after filing his original case, to make Mr. Edwards a party to the lawsuit. Mr. Edwards did not make an appearance in the lawsuit. No lawyer appeared to argue on Mr. Edwards' behalf. Mr. Cole brought a lawsuit in the wrong court against the wrong entity. That case was dismissed. None of the parties to the present action in prohibition were parties to that original case. The arguments of the parties to this civil action were not presented in the original case. The relative rights of the parties to this case were never even discussed during the pendency of the original case. There is no factual basis to assert that the second element of *res judicata* is present here.

The cause of action presented for resolution in this case is the extraordinary remedy of prohibition against a quasi-judicial tribunal that is without jurisdiction to hear and determine a particular dispute—in this case the contest of a municipal election. The appellant's earlier case did not deal with the issue of jurisdiction. Indeed, in the context of appellant's original action the circuit court had no jurisdiction to decide any issue other than whether it had jurisdiction to entertain the appellant's claims. Once the circuit court determined that it had no jurisdiction, it sent the appellant on his way and dismissed his case. The court ordered the appellant back to the municipality for a hearing, but made no

ruling that jurisdiction to conduct such a hearing existed. That issue was not presented to the circuit court because the proper parties to make those arguments were not joined by the appellant. As with the other two, the third element of *res judicata* is non-existent.

V. Conclusion

Reduced to its basics, the appellant's argument can be summed up this way:

> "I wanted to contest a municipal election. I did not follow the law to properly contest the election. Instead, I filed a lawsuit against the wrong parties in a court that had no jurisdiction. The person whose election I wanted to contest should have known what I wanted to do and stepped in to see that I did it correctly. Because I did not follow the law, and because my opponent did not tell me how to do things right, I should be allowed to go back and do it right the second time around, no matter how much delay in the election process that causes."

This is an argument that has no basis either in law, fact or public policy. Acceptance of the appellant's position would simply open the floodgates of litigation to every person who mistakenly misses a statute of limitation, fails to file an appeal petition on time, or neglects to request an administrative hearing within a jurisdictional time period. Elections could not be decided until every unsuccessful candidate either conceded or certified somehow that no case was pending in any court and that no letter objecting to the election was in the mail. The adoption of such an argument would be contrary to the public policy of this state. As this Court has said before:

> "The public policy of this State calls for diligent and timely action by officers, boards, tribunals and courts in ascertaining and declaring that the final results of an election. Election boards may not adjourn until all the votes are counted, and a certificate of result made and signed.... On the fifth day after election the board of canvassers is required to convene to canvass the elections. Adjournment of such boards may be made but no longer than is absolutely necessary. If a recount is desired, a demand therefor must be made before the result is officially declared.... A contestant is required to give notice of contest to contestee within ten days after the last and binding declaration of result....

> Evaluation of the foregoing statutes enacted in furtherance of the public policy above mentioned brings the legislative intent into bold relief: that an election result should be determined and declared with dispatch. The hearing and determination of an election contest is the last preceding by which the object of the legislature is attained, and the statutory provision here considered is an overall limitation of the entire process of making returns of election, canvassing thereof, recounting the ballots cast, and contesting the results." (Citations omitted) *State of W. Va. ex rel Staley v. Wayne County Court, supra.*

The facts, the law and public policy are clear in this case. The ruling of the Circuit Court of Putnam County, West Virginia, should be affirmed.

Respectfully submitted,

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SAM E. COLE,

Intervenor/Appellant.

CERTIFICATE OF SERVICE

I, Harvey D. Peyton, counsel for Appellee, Scott Edwards, do hereby certify that I have this 30th day of September, 2008, served a copy of the foregoing **"Response Brief of the Petitioner/Appellee, Scott Edwards"** upon all parties of record by mailing a true copy thereof, by First Class United States Mail, postage prepaid, as follows:

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